

17 June 2015

SENT VIA E-MAIL TO [TAXTREATIES@OECD.ORG](mailto:TAXTREATIES@OECD.ORG)

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France

**Re: Comments on the OECD Revised Discussion Draft on BEPS Action 6**

Dear Ms. De Ruiter:

The National Association of Real Estate Investment Trusts (NAREIT<sup>1</sup>) appreciates the opportunity to provide comments on the OECD's 22 May 2015 [Revised Discussion Draft on BEPS Action 6: Prevent Treaty Abuse](#) (Revised Discussion Draft). These comments build on our 9 January 2015 comments on the OECD's [21 November 2014 Discussion Draft on Follow Up Work on BEPS Action 6 Preventing Treaty Abuse](#) (Original Discussion Draft). Like our earlier submission, this submission focuses on the treaty entitlement issues with respect to U.S. REITs.

**EXECUTIVE SUMMARY**

The Revised Discussion Draft contains a proposal for language to be included in the Commentary to the OECD Model Tax Convention under the proposed LOB provision that would explicitly reference the OECD's prior work on the treaty qualification and resident status of REITs. This proposed language is a valuable addition to the Commentary and we urge the OECD to include it in its final recommendations under Action 6. The proposal also includes language that would make clear that any specific provision for treaty qualification of CIVs would not be relevant to entities that would be qualified persons under other tests of the LOB provision. This is an important clarification for U.S. REITs and we urge that the OECD include the proposed language in its final recommendations with the addition of a specific reference to REITs as a category of entity that would fall within such language.

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<sup>1</sup> NAREIT is the worldwide representative voice for real estate investment trusts (REITs) and publicly traded real estate companies with an interest in U.S. real estate and capital markets. NAREIT's members are REITs and other businesses throughout the world that own, operate, and finance income-producing real estate, as well as those firms and individuals who advise, study, and service those businesses.



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The Revised Discussion Draft also contains a proposal for a new provision addressing special tax regimes which excludes specified regimes for investment in real estate. Should the OECD decide to include the special tax regime proposal in its final recommendations under Action 6, we request that it be made clear that the U.S. REIT regime (and tax regimes in the more than 30 countries that have adopted similar REIT regimes) would fall within the specified exclusion.

## DISCUSSION

The Revised Discussion Draft addresses the various issues that had been identified in the Original Discussion Draft with respect to the changes to the OECD Model Tax Convention and related Commentary that were proposed in the 16 September 2014 Report on Action 6. These issues include the application of the proposed limitation on benefits (LOB) provision, and treaty entitlement more generally, in the case of collective investment vehicles (CIVs) and other types of investment vehicles.

### Commentary Language Related to REITs

The Original Discussion Draft had included introductory language that equated REITs to CIVs in some circumstances and that suggested parallels between REITs and non-CIV investment funds. As discussed in detail in our January submission, while U.S. REITs share some characteristics in common with CIVs, they do not fall within the CIV definition set forth in the OECD's 2010 CIV report because they do not meet the asset ownership or regulatory regime requirements contained in that definition. Moreover, also as discussed in detail in our January submission, U.S. REITs are not "investment funds," but rather are active businesses that are characterized as operating companies for a variety of regulatory, capital markets and related purposes in the United States. We appreciate that the Revised Discussion Draft addresses REITs in a separate paragraph, consistent with their unique characteristics.

Paragraph 20 of the Revised Discussion Draft indicates that the OECD Working Party responsible for the work on Action 6 noted the concern of the REIT industry that the OECD had not in such work confirmed the conclusions of the OECD's 2008 Report *Tax Treaty Issues Related to REITs* (REIT Report). We believe that it is critically important to incorporate into the proposed changes to the OECD Model Tax Convention an explicit reference to the prior work done by the OECD on the residence status and treaty qualification of REITs as memorialized in the REIT Report. Therefore, we welcome the proposal, set forth in the Revised Discussion Draft, to add to the proposed Commentary on the proposed LOB provision a footnote that contains both a general reference to the REIT Report and the paragraphs in the existing Commentary on Article 10 that deal with the treaty entitlement of REITs and a specific citation to the particular paragraphs of the REIT Report that address the application of the treaty resident definition to REITs. The Revised Discussion Draft indicates that this proposal will be further discussed by the Working Party at its June meeting. We urge the OECD to include this proposed footnote in the final agreement with respect to the LOB provision and related Commentary.



Paragraph 20 of the Revised Discussion Draft also includes a proposal to add language to the proposed Commentary on the proposed LOB provision that would make clear that, while specific rules regarding the application of the LOB provision may be needed for CIVs, no such special rules would be needed with respect to “an entity that would otherwise constitute a ‘qualified person’ under other parts” of the proposed LOB provision. This reiteration of the availability and application of the “regular” LOB provisions is very important for U.S. REITs which are qualified persons under the LOB provisions in existing U.S. bilateral tax treaties and will be qualified persons under the proposed LOB provision being advanced under BEPS Action 6. As noted above with respect to the proposed footnote, the Revised Discussion Draft indicates that this proposed language is to be further discussed by the Working Party at its June meeting. We urge the OECD to include this language in the final agreement with respect to the LOB provision and related Commentary. In addition, we urge the OECD to add to this language an explicit reference to REITs as an illustration of a category of “entity that would otherwise constitute a ‘qualified person’ under other parts” of the proposed LOB provision. This could be accomplished with for example a parenthetical reference to REITs in the language proposed to be included in the Commentary or a footnote to such language.

### Special Tax Regimes

The Revised Discussion Draft includes a new proposal, not included in the Original Discussion Draft, for an addition to the OECD Model Tax Convention to address special tax regimes. Under the proposal, treaty benefits under the provisions related to interest, royalties, and other income would be denied in the case of persons that are subject to a special tax regime with respect to the particular category of income. For this purpose, a special tax regime with respect to an item of income or profit would mean a legislative or regulatory provision or administrative practice that “provides a preferential effective rate of taxation to such income or profit, including through reductions in the tax rate or the tax base.” Several exclusions from special tax regime status are provided, including an exclusion for a provision or practice “that facilitates investment in widely-held entities that hold real property (immovable property), a diversified portfolio of securities, or any combination thereof, and that are subject to investor-protection regulation in the Contracting State in which the investment entity is established”.

The special tax regime proposal was tabled by the U.S. delegate to the Working Party and it mirrors a draft modification to the U.S. Model Tax Convention that has been released by the U.S. Department of the Treasury for consideration and comment. The draft U.S. Model provision is accompanied by a description in the form of draft Technical Explanation language that provides that the exclusion specified above applies to U.S. REITs, noting that they are designed to facilitate collective investment and are subject to investor-protection regulation. In this regard, as discussed in detail in our January submission, U.S. REITs are not generally within the scope of the Investment Company Act of 1940, which regulates the organization and disclosure of financial information of entities that engage primarily in investing, reinvesting, and trading in securities and whose own securities are offered to the investing public. However, U.S. REITs that are registered with the U.S. Securities and Exchange Commission, which is the case for REITs that are publicly traded on a stock exchange or whose interests are sold through broker-



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dealers, are subject to provisions in the Securities Exchange Acts of 1933 and 1934 that contain rigorous disclosure obligations. The draft U.S. Technical Explanation language reflects the determination that these obligations are sufficient for U.S. REITs that are widely held to meet the requirements for the specified exclusion from the definition of special tax regime.

The Revised Discussion Draft indicates that the Working Party has concluded that it will need to reach decision on this proposal with respect to special tax regimes at its June meeting, taking into account the comments that are received. Should the Working Party decide to include the special tax regime provision in its recommendations, we request that the Commentary language accompanying such provision include an explicit statement that the U.S. REIT regime qualifies for the exclusion from special tax regime status for legislation that facilitates investment in widely-held entities that hold real property. We note that more than 30 other countries have adopted REIT rules and that the exclusion from special tax regime status should apply to them as well.

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NAREIT appreciates the OECD's focus on the treaty qualification of REITs in the Revised Discussion Draft, which builds on the important work that was done by the OECD in connection with the 2008 REIT Report. NAREIT welcomes the opportunity to provide these further comments, which are intended to clarify the treatment of U.S. REITs under new proposals contained in the Revised Discussion Draft.

We would be happy to discuss the matters addressed in this letter or to respond to questions or to provide additional information. I can be reached at (202) 739-9408 or [tedwards@nareit.com](mailto:tedwards@nareit.com) and Dara Bernstein, NAREIT's Senior Tax Counsel, can be reached at (202) 739-9446 or [dbernstein@nareit.com](mailto:dbernstein@nareit.com).

Respectfully submitted,



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Executive Vice President and General Counsel

